

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

AMANDA L. RICKS)	
Claimant)	
VS.)	
)	
VIA CHRISTI HEALTH, INC.)	Docket No. 1,052,856
Self-Insured Respondent)	

ORDER

Respondent appealed the June 27, 2013, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on October 25, 2013, in Wichita, Kansas.

APPEARANCES

E. L. Lee Kinch of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, the parties stipulated that if the Board found claimant provided timely notice and proved she sustained a personal injury by accident arising out of and in the course of her employment with respondent:

- claimant has a 20% functional impairment to the body as a whole for her lumbar condition, with 5% preexisting this claim and 15% resulting from her 2010 accident that gave rise to this claim;
- respondent is entitled to a credit, pursuant to K.S.A. 2009 Supp. 44-501(c), of 5% for claimant's preexisting functional impairment;
- claimant's fringe benefits were terminated by respondent on September 1, 2011;
- claimant has a task loss of 32.6%;

- commencing May 7, 2011, through August 10, 2011, when claimant was working for respondent, a period of 13.57 weeks, claimant was entitled to \$310.21 per week of permanent partial disability benefits based upon her functional impairment, or \$4,209.55;
- commencing August 11, 2011, through August 31, 2011, a period of 3 weeks, claimant was unemployed, but receiving her fringe benefits. During this period, claimant was entitled to \$310.21 per week of permanent partial disability benefits based upon a 66.3% work disability, or \$930.63;
- commencing September 1, 2011, through October 9, 2011, a period of 5.57 weeks, claimant was unemployed, no longer receiving her fringe benefits and entitled to \$420.41 per week of permanent partial disability benefits based upon a 66.3% work disability, or \$2,341.68; and
- commencing October 10, 2011, through the present, claimant is entitled to receive \$420.41 per week of permanent partial disability benefits based upon a 48.1% work disability (based upon a task loss of 32.6% and a wage loss of 63.5%).

ISSUES

ALJ Clark found claimant was injured out of and in the course of her employment with respondent from May 26, 2010, through June 3, 2010.¹ ALJ Clark implied claimant gave timely notice by finding claimant's injury was compensable. The ALJ determined claimant sustained a 20% whole body functional impairment and a 48.8% work disability (based upon a 32.6% task loss and a 65% wage loss) and awarded claimant temporary total and permanent partial disability benefits.

Respondent contends claimant failed to prove she sustained an accidental injury arising out of and in the course of her employment. Further, respondent maintains claimant failed to provide notice of an injury within 10 days of her accident, which respondent asserts occurred on May 26, 2010.

Claimant contends she sustained a series of repetitive accidents from May 26 through June 3, 2010, that arose out of and in the course of her employment. Therefore, her date of accident is June 3, 2010, and she provided timely notice of her injury.

The issues before the Board on this appeal are:

¹ At page 4 of the Award, ALJ Clark found claimant was injured out of and in the course of her employment with respondent on May 26, 2010, and each and every working day through June 3, 2010. In the award section at page 6, the Award indicates claimant's accidental injury was sustained on May 26, 2010.

1. What is claimant's date of accident? Specifically, did claimant's injuries result from a single traumatic accident on May 26, 2010, or from a series of repetitive accidents from May 26, 2010, through June 3, 2010?

2. Did claimant provide respondent timely notice?

3. Did claimant sustain a personal injury by accident arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant began working for respondent in 2007 as a patient care technician, or a certified nurse's aide. Her job duties included moving patients weighing from 100 to 400 pounds, pushing and pulling items weighing up to 75 pounds, lifting and carrying items weighing up to 50 pounds at waist level for distances up to 100 feet, and lifting up to 30 pounds to shoulder height. Claimant alleges that on May 26, 2010, she initially injured her low back while moving a patient and aggravated her low back injury by performing her regular job tasks through June 3, 2010.

Prior to May 26, 2010, claimant had a history of low back pathology. In 1997 or 1998, she underwent an L1-2 laminectomy. Claimant received treatment for her low back from Dr. Abay and Dr. Kris Lewonowski, including epidural steroid injections. Claimant admitted complaining to Dr. Lewonowski of having low back pain with radiation down her left leg and numbness into the lateral two toes of the left foot. In July 2009, claimant saw her family physician for low back pain, as she had strained her back at work. Claimant received chiropractic therapy for that injury. In March 2010, claimant fell from a ladder at home while painting. Claimant hurt her neck and ankle and was hospitalized for 28 hours. Claimant indicated an MRI was performed on her cervical spine and an x-ray taken of her lumbar spine. Claimant was cleared to return to work for respondent.

Claimant testified she had several heavy patients on her floor. Sometimes, it took four or five employees to move those patients. On the evening of May 26, 2010, claimant and other employees had been in the rooms of three heavy patients several times. After helping one of those patients and while assisting a smaller patient, claimant felt pain in her low back. Claimant continued working and did not report the low back injury.

The next day, May 27, 2010, claimant returned to work performing her normal job tasks, but had burning, stabbing, sharp pains in her back and numbness in her left leg. Claimant mentioned her symptoms to her supervisor, charge nurse Christy Reser, and pulled out an incident report, but did not have time to complete it. Claimant was off work from May 28 through May 30, 2010. Claimant returned to work on May 31, 2010, and

continued maneuvering and assisting patients, which caused her to aggravate her back condition.

Claimant was off work on June 1, 2010, and returned to work performing her regular duties on June 2. She testified of obtaining an incident report, but did not get time to complete it. She then forgot to complete it and did not remember it until on her way home from work. Claimant testified that on June 3, she performed her same duties and had burning, sharp pain and “was getting to where I couldn’t even stand.”² Claimant indicated she completed an incident report on June 3, and gave it to another charge nurse, Elizabeth Church. Claimant testified she told Ms. Church she had been injured a week earlier. According to claimant, Ms. Church refused to sign the incident report because she was not present when the injury occurred and she was afraid claimant’s injury occurred when she fell while painting at home. Claimant did not keep a copy of the incident report. After notifying her charge nurse, claimant went home mid-shift.

Claimant initially saw Dr. Kirk R. Bliss on June 14, 2010, for her back injury. Dr. Bliss is board certified in family medicine and is a colleague of Dr. Yao-Ying Yang, claimant’s regular family physician. Claimant saw Dr. Yang on June 24, 2010, and took paperwork from him to respondent’s director of nursing, Theresa Mason. According to claimant, Ms. Mason indicated she was not certain if claimant injured her back at work and that the back injury could have been from the fall at home in March 2010. Ms. Mason did not testify.

Claimant completed Family and Medical Leave Act and short-term disability applications on June 24, 2010, but did not indicate on the applications that her low back injury was work related. Claimant’s application for short-term disability was granted. She indicated she was unaware that Dr. Yang completed an attending physician statement for the short-term disability. It was only later that claimant learned Dr. Yang indicated on the attending physician statement that the low back injury was not work related. Claimant testified she informed Dr. Yang on June 24, 2010, the low back injury was work related.

Ms. Reser testified claimant never indicated to her that she sustained an injury at work in late May or early June 2010. Ms. Reser testified she has never worked on Thursdays. May 27, 2010, the day claimant alleged she gave notice of her injury to Ms. Reser and requested to complete an incident report, was on a Thursday. Ms. Reser testified:

Q. (Mr. Kinch) You say her back hurt. Did she complain to you periodically about her back hurting or could you notice her body language evidencing a back problem?

² P.H. Trans. at 17.

A. (Ms. Reser) I suppose from time to time, but I think it is that way with everybody.³

Ms. Church testified she was never notified in May or June 2010 by claimant of sustaining a back injury at work or claimant wanting to complete an incident report. Nor did Ms. Church refuse to sign an incident report completed by claimant. Ms. Church admitted that on June 3, 2010, she was asked by claimant if she could go home because her toes were numb and tingling. According to Ms. Church, claimant never said the numbness and tingling was because of anything that happened at work.

Claimant underwent an L1-2 fusion and discectomy or laminectomy on February 22, 2011. Claimant testified that after her temporary total disability benefits were terminated, she returned to light duty for respondent around May 7, 2011. Claimant continued to work for respondent until August 10, 2011, when she was terminated for excess tardiness. She attempted to apply for unemployment benefits, but was not allowed to because of her restrictions. Claimant remained unemployed until October 10, 2011, when she began working for Maxim Healthcare Services. Claimant makes \$11 per hour at Maxim and her hours are not consistent.

Dr. Bliss testified that when he saw her on June 14, 2010, claimant complained of low back pain that had been going on for two weeks and claimant did not remember a specific injury. Claimant indicated she worked at a hospital and did not think she could lift patients due to the pain. Dr. Bliss assessed claimant with lumbar radiculitis and a history of L1-2 herniated disc, status post laminectomy.

Dr. Yang is board certified in family practice. He saw claimant in July 2009 for complaints to her low back. Claimant indicated she had torqued her back while twisting. Dr. Yang's diagnosis was low back pain and a question of early arthritis.

When Dr. Yang saw claimant on June 24, 2010, she presented with persistent low back pain with radiculopathy. The note from that visit does not specify claimant sustained an injury and claimant did not describe an actual incident. Dr. Yang's diagnosis on June 24, 2010, was tenderness in the low back area and evidence of radiculopathy. Dr. Yang completed a short-term disability form associated with the June 24, 2010, visit. He marked "no" on the form for the question of whether the condition of the patient was due to injury or sickness arising out of her employment. Dr. Yang recorded a date of June 1, 2010, as the date symptoms first appeared. Dr. Yang indicated that he completed the short-term disability form in claimant's presence and the information for the form was provided by claimant and was also based on the examination. He testified:

³ *Id.* at 49.

Q. (Mr. Kinch) Do you have an independent recollection, Doctor, aside from your medical records in the chart, of her having discussed, Ms. Ricks having discussed with you at some point hurting her back on the job at Via Christi Health?

A. (Dr. Yang) She had mentioned it, yes.

Q. Describe for the court what you can recollect about it, Doctor.

A. The note from Dr. Bliss was noted and that was the 6-2-2010 *[sic]*⁴ note that outlined that injury. The patient states that she stated that she does not think that she's going to be able to lift patients secondary to the pain that she's having. She did reference that she worked at a hospital. It didn't specifically say -- there was no cause for the pain.

So when she came to see me on 6-24-2010, she described the pain with the radiculopathy. We did then go over the short-term disability sheet and the question was posed, was this injury, did it occur at work, because I had to ask her that question. And she answered no.

Q. Well, the question, original question was did you have an independent recollection of having discussed with her an injury that occurred at work?

A. I asked her how the injury could have occurred and she said that she lifts a lot of patients at work.⁵

Dr. Yang saw claimant on July 6, 2010, for evaluation of low back pain with radiculopathy. Claimant indicated both of her legs were numb. Dr. Yang's notes from that appointment do not indicate claimant mentioned any history that her low back pain was associated with an injury at work or a specific injury. From the time Dr. Yang saw claimant on June 24, 2010, none of his chart notes mentioned claimant's low back condition resulted from work activities or a work-related injury. Dr. Yang recommended physical therapy and that claimant be seen by Dr. Raymond W. Grundmeyer, III, for a neurosurgical consultation.

Dr. Yang had an independent recollection of reading Dr. Grundmeyer's neurosurgical consultation and, therefore, some knowledge that claimant reported to Dr. Grundmeyer of sustaining a specific injury on or about June 2, 2010. Dr. Yang testified the injury claimant identified as having been sustained during the course of her employment on June 2, 2010, would, in temporal terms, correspond with the onset of symptoms of low back pain she described to Dr. Bliss when she saw him on June 14, 2010.

⁴ June 14, 2010, is the correct date of Dr. Bliss' note.

⁵ Yang Depo. at 23-24.

Claimant saw Dr. Grundmeyer on August 11, 2010. Her chief complaint at that time was low back pain. In his history, Dr. Grundmeyer recorded that claimant's current symptoms began after lifting a heavy patient on June 2, 2010, and claimant was complaining of numbness and tingling to the bilateral lower extremities while working. The Past Surgical History section of Dr. Grundmeyer's report notes claimant had lumbar surgery in 1998.

In reply to a letter he received from claimant's attorney dated November 24, 2010, Dr. Yang responded affirmatively to the following question: "The question is whether, assuming the foregoing history [in the letter] of the onset of Ms. Ricks' low back pain and assuming her history of degenerative disc disease, did the episodes of lifting which occurred on May 26, 2010, and continued through June 3, 2010, aggravate Ms. Ricks' pre-existing condition."⁶

At the request of her attorney, claimant was seen by Dr. George G. Fluter one time, on December 20, 2011. Claimant told Dr. Fluter of having lumbar spine surgery somewhere around 1998. After recovering from that surgery, claimant had really no other problems with her back. The doctor also reviewed x-rays of claimant's spine taken on March 9, 2010, but did not recall that those x-rays were as the result of a fall from a ladder. Dr. Fluter also reviewed the medical records of Drs. Bliss and Yang.

The history Dr. Fluter took from claimant indicated she was working at respondent as a CNA and while assisting in the repositioning of a patient in bed on or about May 26, 2010, she experienced pain in the back at that time. She later assisted another patient with repositioning and during that time claimant said her left leg went numb. Her symptoms worsened over the next few days and she reported the injury to her employer.

Claimant complained of pain in the lower back, buttocks, left thigh/lower leg, perineal area and the feet. Her pain level varied from four to nine (on a scale of zero being no pain to ten being worst pain). The pain was intermittent, but claimant experienced pain every day. Claimant reported loss of urogenital sensation and she sometimes would go all day without feeling the need to void.

Dr. Fluter opined claimant had a work-related injury series from May 28, *[sic]* 2010, to June 3, 2010. The doctor diagnosed claimant as having low back and left lower extremity pain/dysesthesia, lumbar discopathy with probable radiculopathy and she was status post lumbar spine surgery that was performed on February 22, 2011. Dr. Fluter felt there was a causal relationship between claimant's condition at the time he saw her and the work-related activities and injuries as described. The doctor opined, pursuant to the

⁶ *Id.*, Ex. 4.

AMA *Guides*,⁷ that claimant had a 20% whole body functional impairment and placed claimant in DRE lumbosacral spine impairment category IV, which is a loss of motion segment integrity related to the spinal fusion surgery claimant underwent. Dr. Fluter acknowledged the fusion claimant had following the 2010 injury was at the same level (L1-2) as the 1997/1998 laminectomy and that claimant would have a 5% whole body functional impairment attributable to the 1997/1998 laminectomy.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁹

The Board finds claimant proved by a preponderance of the evidence that she sustained a low back injury as the result of a series of repetitive accidents from May 26, 2010, through June 3, 2010, arising out of and in the course of her employment with respondent. Claimant testified she initially injured her back on May 26, 2010, while assisting a patient and felt low back pain and numbness in her left leg when she returned to work on May 27, 2010. Claimant aggravated her low back condition while working on May 31. She again experienced low back pain on June 2 and 3, 2010. Claimant attributed her symptoms to her work activities.

Claimant alleges she reported her injuries to respondent by notifying Ms. Reser on May 27, Ms. Church on June 3 and Ms. Mason on June 24, 2010. Ms. Reser and Ms. Church denied that claimant told them about sustaining a work injury. However, Ms. Mason did not testify. After hearing the testimony of claimant, Ms. Reser and Ms. Church ALJ Clark determined in his December 2, 2010, preliminary hearing Order that respondent had notice on June 3, 2010. In a February 28, 2011, Order, Board Member Julie A.N. Sample found credible claimant’s testimony that she notified her supervisors of her back complaints in a timely manner. After hearing and receiving additional testimony and evidence, ALJ Clark again awarded claimant workers compensation benefits in the June 27, 2013, Award. That implies he believed claimant when she testified she notified her supervisors of sustaining a work injury.

⁷ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁸ K.S.A. 2009 Supp. 44-501(a).

⁹ K.S.A. 2009 Supp. 44-508(g).

The Board acknowledges and recognizes the advantage of the ALJ to assess witness credibility.¹⁰ As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,¹¹ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. The Board concurs with ALJ Clark and finds claimant gave timely notice of her accident to respondent.

K.S.A. 2009 Supp. 44-508(e) states:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 2009 Supp. 44-501(c) provides: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting." Here, the parties agreed respondent is entitled to a 5% credit for claimant's preexisting condition.

The Board has subtracted the percentage of impairment determined to be preexisting from each percentage of permanent partial disability. This has been determined to be the best method to apply K.S.A. 2009 Supp. 44-501(c).

CONCLUSION

1. Claimant sustained a low back injury through a series of repetitive accidents from May 26 through June 3, 2010, arising out of and in the course of her employment with respondent.

2. Claimant provided timely notice of her accident to respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings

¹⁰ *Cannon v. Sanders Construction*, No. 198,389, 1995 WL 715327 (Kan. WCAB Nov. 8, 1995).

¹¹ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

¹² K.S.A. 2012 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the June 27, 2013, Award entered by ALJ Clark as follows:

Amanda L. Ricks is granted compensation from Via Christi Health, Inc., for a June 3, 2010, accident and resulting disability. Ms. Ricks is entitled to receive the following disability benefits:

Based upon an average weekly wage of \$465.29, Ms. Ricks is entitled to receive 47.29 weeks of temporary total disability benefits at \$310.21 per week, or \$14,669.83.

For the period from May 1, 2011, through August 10, 2011, based upon an average weekly wage of \$465.29, Ms. Ricks is entitled to receive 14.57 weeks of permanent partial disability benefits at \$310.21 per week, or \$4,519.76, for a 15% whole body functional impairment.¹³

For the period from August 11, 2011, through August 31, 2011, based upon an average weekly wage of \$465.29, Ms. Ricks is entitled to receive 3 weeks of permanent partial disability benefits at \$310.21 per week, or \$930.63, for a 61.3% work disability.

For the period from September 1, 2011, through October 9, 2011, based upon an average weekly wage of \$630.59, Ms. Ricks is entitled to receive 5.57 weeks of permanent partial disability benefits at \$420.41 per week, or \$2,341.68, for a 61.3% work disability.

For the period commencing October 10, 2011, based upon an average weekly wage of \$630.59, Ms. Ricks is entitled to receive 141.81 weeks of permanent partial disability benefits at \$420.41 per week, or \$59,618.34, for a 43.1% work disability. The total award is \$82,080.24.

As of January 21, 2014, Ms. Ricks is entitled to receive 47.29 weeks of temporary total disability compensation at \$310.21 per week, or \$14,669.83, plus 17.57 weeks of permanent partial disability compensation at \$310.21 per week, or \$5,450.39, plus 124.86 weeks of permanent partial disability compensation at \$420.41 per week, or \$52,492.39, for a total due and owing of \$72,612.61, which is ordered paid in one lump sum less any

¹³ The parties stipulated that commencing May 7, 2011, claimant was working for respondent and was entitled to permanent partial disability benefits based upon her functional impairment. The Board finds claimant's permanent partial disability benefits based upon her functional impairment should commence May 1, 2011, immediately following the end of her temporary total disability benefits.

amounts previously paid. Thereafter, the remaining balance of \$9,467.63 shall be paid at \$420.41 per week until paid or until further order of the Director.

The record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant
elleekinchlaw@gmail.com; kinchel@sbcglobal.net

Edward D. Heath, Jr., Attorney for Respondent
heathlaw@swbell.net

Honorable John D. Clark, Administrative Law Judge